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NO. 84146

Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

FRANK B. HUBBY

Petitioner,

vs.

THE HISTORIC SAVANNAH FOUNDATION,

GEORGIA SEMIQUINCENTENARY COMMISSION,

MR. B. H. LEVY, CHAIRMAN,

GEORGIA ENDOWMENT FOR THE HUMANITIES,

Respondents

PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Eleventh Circuit

Frank B. Hubby, M.D.
propria persona
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Savannah, GA 31401
(912) 232-5511

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QUESTIONS PRESENTED FOR REVIEW

1. Does the "private" correspondence of a district court encouraging a pro se litigant to move forward with his claim mitigate against an attorney fee award for so proceeding?

2. Does an invitation to speak on political questions at a public meeting, called by a private party and the State, create First Amendment rights such that the award of attorney's fees for claiming such a right is impermissible under the Constitution?

3. Does the Court's decision, adopted by the Eleventh Circuit, place the governance of the First Amendment (given a strong and difficult First Amendment suit here) under congressional statute?

4. Are the issues here so ripe, and so reasonably important that the Supreme Court might now, in fairness and in justice, rule on the improper awarding of summary judgement in this case.

5. What degree of padded and sham billings--used to so improperly punish a civil rights litigant proceeding in good faith,

bringing a suit strong in fact and law--ought to be disciplined upon that case reaching the Supreme Court?

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PETITION FOR WRIT OF CERTIORARI

To the United States Court of Appeals

For the Eleventh Circuit

Petitioner prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Eleventh Circuit entered in the entitled case on July 31, 1985

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is unreported. The opinion is set forth in the Appendix at page A-34.

The opinion of the United States District Court for the Southern District of Georgia, Savannah Division, is unreported. The opinion is set forth in the Appendix at page A-2.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28 U.S.C., Section 1254.

CONSTITUTION AND STATUTES INVOLVED

United States Constitution

AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

42 U.S.C.A. 1988

In any action or proceeding to enforce a provision of Sections 1981, 1982, 1983, 1985 and 1986 of this title, Title IX of Public Law 92-318, or Title VI of the Civil Rights Act of 1964, the Court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

Alleging improper restraint of his First Amendment right to speak at a state-sponsored public colloquium, this pro se Petitioner applied to the United States District Court for the Southern District of Georgia for injunctive and general relief on February 11, 1983. The denial of an injunction was upheld by the United States Court of Appeals for the Eleventh Circuit and the Supreme Court. The Court wrote a private letter to Petitioner congratulating his argument at the T.R.O. Hearing (IV at 1021 and A-1). The Court found that Petitioner proceeded in good faith (I at 23 and 63).

Denying the motions to dismiss, the Court found that the Petitioner might prove a First Amendment forum (I at 159). The Court allowed Petitioner to amend his complaint adding a count under §1983 of 42 U.S.C.A. and adding a defendant under §1983. Summary judgement was granted Defendants on November 23, 1983. The Eleventh Circuit affirmed and Plaintiff's petition for a writ of certiorari was denied October 3, 1984. The litigation having been funded by Petitioner, spending $8600 , attorney's fees and costs were awarded against him in the amount of $34,627.30 on January 17, 1985. Arguing the Court's analysis represented the application of an inappropriate standard under §1988 of 42 U.S.C.A.; that the Court in private correspondence had encouraged Petitioner to proceed, and found he did so in good faith; that the Court's findings were not supported by the facts; and that the award was inequitable and unfair and represented in good part sham billings by one Defendant, the Petitioner appealed to the

Eleventh Circuit and the panel upheld on July 31, 1985. His request for rehearing was denied August 23, 1985.

STATEMENT OF FACTS

1. The Town Meeting. A private organization, Historic Savannah Foundation (HSF) has sponsored in the schools a historic enactment/colloquium, and in 1983 this was brought to the general public during the 250th state celebrations.

The event consists of an enactment followed by a public discussion of the development of modern Savannah and Georgia. The format calls for the public attending to give "philosophical statements" (II at 545-548). For the meeting on February 7, 1983, the public was invited to address at that part of the meeting set aside for public discussion, the most important political questions (I at 10). The floor was open to such modern topics as the development of the port,city planning, and race relations. There were no rules of any kind. The public could engage in discussion, debate and publicly take

on the Mayor on the most controversial of subjects (Jones-Ratterree* deposition, pages 71, 82-83,85,104,107,109,111,112,122,124).

The Petitioner, a civic minded citizen, searched for a forum where he could discuss political corruption in Savannah and the participation by elements of the business and professional community in drug trafficking. On the afternoon of February 7, 1983, he called the official in charge of the event and inquired if, within the format and at the appropriate time, he would be permitted to publicly present comments from his perspective as to how Savannah had evolved. "That is exactly what we are looking for," he was told (Testimony T.R.O. hearing, page 7). When he arrived at the meeting, he was informed by that official that "everything had changed;" that he could not speak; that the public part of the meeting had been cancelled; but that he could "ask a question in the lobby" when

*Out of courtesy, Petitioner requests the parties and Court to refer to this official by her title.

the meeting was over (Transcript T.R.O. hearing, pages 7-9). Because he did not show in advance what he was going to say, there was worry he might be controversial. A decision was taken in the afternoon to prevent the Petitioner from speaking publicly and to cancel the public part of the meeting (Jones-Ratterree deposition, pages 165,172,178). The President of HSF testified he understood Petitioner was restrained because of the rumor he might discuss "drugs"(Allen deposition excerpts, A-3, Appeal Brief to the Eleventh Circuit). The officer in charge testified no harm would have come to the meeting had Petitioner been allowed to speak (Jones-Ratterree deposition, 210-211). Commissioner Vaquer shows that "an open town meeting" was planned (II at 575).

2. State Involvement. For the 250th year the Georgia legislature created a state commission to take up the work of HSF (II at 524,525,538-540). Of the twenty-five members of the Commission, half were from Savannah, and half of these were members of HSF,

including the two most-controlling--Chairman Levy and Commissioner Russell (II at 529). The Savannah celebrations were run jointly by the Commission and HSF (II at 528,551-552). The Commission took up the town meeting; published the prospectus on which it was based; and designated the one on February 7, 1983 as an official state event (II at 299,543,545-547). A project of current interest to the Commission and HSF was inserted onto the agenda of the February 7, 1983 meeting (II at 554-556). Chairman Levy arranged for funding of the meeting through the Georgia Endowment for the Humanities (GEH)(II at 563,566,568,569). Commissioner Vaquer chaired the finance and screening committees passing on the town meeting applications; he participated in the event and critiqued it for the GEH (II at 557, 574-575). Commissioner Ellington testified that the Commission and HSF were "almost indistinguishable" (II at 535).

3. The litigation of the case. The Petitioner, believing he was going to easily

prove his case, suggested to the Court soon after filing his complaint a conference of the parties with a view towards common sense settlement (Cited at III at 763, and A-2 Appeal Brief to Eleventh Circuit).

The Petitioner's pleadings caused Defendants little difficulty: "It should be noted from these time records that a minimum of time was spent in discovery by Defendants in this case--no depositions were taken by this Defendant nor were interrogatories, requests to produce or requests to admit served." (III at 864) "While Plaintiff's legal issues were novel, once the underlying facts of the case were established, the application of law to facts did not present a difficulty in establishing the State Defendant's case...in a minimum of time." (III at 865)

Petitioner's total expenditures in costs, fees, expenses were $8607.01 (Appeal Brief to Eleventh Circuit, A-2).

4. Attorney Fee Litigation. The Court allowed all of the Defendants' hours sub-

mitted (Order, pages A-27,A-32). Counsel for the least involved Defendant, GEH, doing the least work in the case, and "relying upon papers filed by co-defendants" (IV at 1169), claimed the most hours--175.6. GEH claimed more hours on the attorney fee award--98, than on the case itself--77.

Counsel for GEH was allowed 60.7 hours for "receipt and review" sessions, intra-office conferences, and innumerable questionably productive telephone calls (III at 773,818,823, 831; IV at 902,1100). The Court allowed billings for a phone call about the weather on March 24, 1983; a receipt and review noting Petitioner was going on vacation June 30, 1983; and a phone call to Washington to find out if certiorari had been granted October 1, 1984.

The only evidence brought forward on the motions for the fee award was brought by Petitioner: two attorneys experienced in civil rights law testified Petitioner brought a debatable First Amendment claim (IV at 1014-1017).

REASONS FOR GRANTING THE WRIT

The decision of the Court and the Eleventh Circuit in a strong First Amendment case are at odds with applicable decisions of the Supreme Court and law in all the circuits.

The District Court encouraged in "private" correspondence (A- 1) that the Petitioner move forward, this case representing the ultimate First Amendment issue: prior restraint of a speaker at a state political forum on the fear and loathing of an idea he might express. There was never doubt that this case was other than difficult, complex and important.

The Petitioner brought to the Court an issue of material fact on the improper restraint. The issue was joined and controversy remained throughout, summary judgement improper for reasons in the petition for a writ of certiorari of July 1984. The error of the District Court has been compounded by the award of attorney's fees.

The Court's decision, taken up by the Eleventh Circuit, fundamentally re-writes First

to a pro se litigant, in fairness, represents encouragement at a time when the constitutional issues were quite unclear. The Petitioner's statement at the T.R.O. Hearing showed how the circumstances of this meeting created a First Amendment forum. And upon the motions to dismiss, the Court held that "the plaintiff may be able to prove facts which would establish that the meeting was in fact a public forum" (I at 159).

The Petitioner established during discovery all he alleged at the T.R.O. Hearing.

A judge serves in term and any action relevant to ongoing litigation is never "private." It was reasonable for the Petitioner to hold the Court signalled that although his case did not merit injunctive relief, he was on the right track. Such a letter sent by a district court to a pro se litigant may be analagous to a right to sue letter, as in Bowers v Kraft Foods, 606 F. 2d 816 (8th Cir. 1979).

The Court found the Petitioner "an

unusually public spirited citizen" (I at 20), motivated by a belief that his constitutional rights had been violated (Transcript T.R.O. Hearing at 63). Although a finding of good faith does not alone preclude an attorney fee award, it is a mitigating factor. Hughes v Repko, 578 F. 2d 483, 489 (3rd Cir. 1978).

In Hermes v Hein, 742 F. 2d 350 (7th Cir. 1984), the Seventh Circuit reversed a fee award against plaintiffs raising First Amendment and due process issues because although their evidence was not sufficient to survive summary judgement, the district court had ruled their allegations sufficient to state a cause of action.

Here the Court recognized the constitutional issues were difficult. The Court had a number of opportunities to signal this pro se litigant that his case was in peril, though that was not the judgement of the Court as the litigation unfolded. The Court kept giving the green light.

The case was not frivolous when the Court

allowed an emergency hearing on a Saturday morning; when the Court sent private congratulations; when the Court denied the motion to dismiss; when the Court allowed an amendment under §1983; and when the Court allowed Petitioner to name an additional defendant under §1983. The case was not frivolous when the Petitioner summarized for the Court all of the facts and relevant law showing why he should actually prevail (III at 640).

Even after motions for summary judgement had been filed, the Court invited Petitioner to a pre-trial conference, and to prepare a pre-trial order (II at 485).

In discovery, Petitioner's case grew stronger, the documents and testimony affirming his allegation: that Defendants had opened a forum for the communication of ideas precluding the restraint of a citizen on the basis he might be controversial.

Only upon looking back, Petitioner having been denied certiorari, did the Court find one of the finest statements of First Amendment

rights heard in many a day transformed into a "diatribe" (Order, page A-19).

The Court, in re-writing the case, found that the Petitioner had permission to speak from "unspecified employees" (Order, page A-4) when Petitioner showed from the beginning that the permission came from the official in charge who knew exactly what the meeting was all about.

The Supreme Court does not allow this type of post hoc re-analysis for the reason that it tends to discourage all but the most predictably air-tight cases, and will tend to chill the rights of citizens with strong cases which require the careful sifting out of factual and legal issues.

B. The Court Misapplied Christiansburg Standards.

Cohesive Circuit law has been that if a plaintiff in a civil rights case proceeds on any reasonable grounds, attorney fees will not be awarded against him.

In P. Mastrippolito and Sons v Joseph, 692 F. 2d 1384 (3rd Cir. 1974), plaintiff did

not respond to the motion to dismiss nor answer interrogatories even when ordered by the court. The court refused to award attorney's fees, and the Third Circuit refused to disturb because the facts were obscure. In White v South Park Independent School District, 693 F. 2d 1163 (5th Cir. 1982), the Fifth Circuit reversed an award of attorney's fees where plaintiff challenged his job firing. He was fired for emotional problems and threats, not on account of discrimination, but his claim was supported by previous good work evaluations. In Tarter v Raybuck, supra, parents challenged the expulsion of their son who had been searched in school for drugs. They prayed for relief compelling readmission although he was expelled only for one semester. In reversing a fee award the Sixth Circuit held "this lawsuit is the type of case contemplated by the Supreme Court in enunciating the words of caution (in Christiansburg)...The issue of consent was reasonably in dispute." Id at 988. In Badillo v Central Steel and Wire Co., 717 F.

2d 1160 (7th Cir. 1983), plaintiff filed multiple class actions and multiple allegations, almost all of which were thrown out; still the Seventh Circuit found reasonable cause for proceeding.

The Petitioner had reasonable grounds for proceeding under the "state action" requirement in that he brought forward a great deal of evidence showing that the private party in more immediate control of the town meeting had essentially "created" the state commission to take over HSF's work for the 250th year. The state commission and the private party were inextricably bound together in scheduling, supervising and managing the official events of the founding celebration in Savannah. The state commission and HSF were, as in the affidavit of Commissioner Ellington, "almost indistinguishable." The relationship constituted the degree of "symbiosis" sufficient to proceed. Burton v Wilmington Parking Authority, 365 U.S. 715 (1961)

The determination of First Amendment

rights depends upon the answers to reasonably difficult and complex questions: Was the public invited to this place for the purpose of communicating ideas? What were the competing interests of the speaker, the state, the public, and the organizers? Was the restraint imposed in the interest of preserving the essential harmony of the meeting, or in the interest of suppressing controversy? Lloyd v Tanner, 407 U.S. 551 (1972); Perry Ed. Assn. v Perry Local Ed. Assn., 460 U.S. 37 (1983); Tinker v Des Moines Community School District, 393 U.S. 503 (1969).

It wasn't clear from the newspaper what type of event was planned; and that is why the Petitioner called the official in charge and asked if, within the format, at the appropriate time, he might give a few comments on his views on how Savannah was evolving. "That is exactly what we are looking for," he was told.

There is no avoiding the conclusion, even if the facts are reviewed in a light hostile to Petitioner, that the organizers opened a public discussion on important social

and political ideas. In the parlance of Lloyd v Tanner, supra, they invited "hand-billing."

The Petitioner reasonably held that this serious state colloquium met the First Amendment test proferred in Fernandes v Limmer, 663 F. 2d 619 (5th Cir. 1981) in that the essential purpose of the place and the population who took advantage of the invitation extended made it an appropriate place for the communication of views of political and social significance.

The Petitioner did not argue that this meeting was a classic "public forum," but that the circumstances and the State's involvement created at least limited First Amendment rights allowing the Petitioner to participate without being restrained because he might be controversial. Perry Ed. Assn. v Perry Local Ed. Assn., supra.

In telling the Petitioner that he could make his comments at the appropriate time, the official in charge placed him and his purpose within the boundaries of the meeting. His topic was the topic of the meeting; his means of expression was the means of the meeting; and his purpose in coming was the exact purpose to which the meeting was dedicated. The Petitioner adopted "the forum's official business." Perry Ed. Assn. v Perry Local Ed. Assn., 460 U.S. 551, 103 S. Ct. 948, 74 L Ed 2d 794, 809 (1983).

When the decision was taken to restrain the Petitioner, no one knew--beyond rumor--what he was going to say; whether during the public part of the meeting he was going to discuss political corruption in Savannah or whether he was going to ask the most innocuous of questions. He stood restrained before he spoke.

A private organization had "borrowed" the State for the occasion, the State clothed in the policies and purpose of the private organization and placing the stamp of officialdom upon the suppression of an idea.

In the name of the State, it was all right to discuss architecture, city planning, the growth of the port, the restoration of squares, and race relations, but it was not all right to discuss how Savannah commerce had gotten into drug trafficking.

Constitutionally it is more invidious to restrain a speaker at a serious state colloquium where minds are attuned to hear the message of the speaker, than at a street corner where the speaker competes with untold numbers of distractions.

Once a limited or full First Amendment forum is opened, the Supreme Court will not allow the suppression of controversy in the guise of time, place or manner regulations. Consolidated Edison Co. v Public Service

Commission, 447 U.S. 530 (1980); Perry Ed. Assn. v Perry Local Ed. Assn., supra; Tinker v Des Moines Community School District, 393 U.S. 530 (1969). Time, place and manner regulations affecting protected expression must be content neutral. Police Department of the City of Chicago v Mosley, 408 U.S. 92 (1972).

The Court's task under §1988 and Christiansburg was to determine, in light of the evidence, if it was reasonable for Petitioner to hold Defendants had opened a forum for the communication of ideas. That was the task the Court did not perform.

The Court did not examine the evidence. None of the facts summarized in this petition--which are uncontroverted--which touch on the contentious nature of the forum established and the nature of the restraint imposed--is even mentioned in passing. The Court reached its findings--and the Eleventh Court allowed--by ignoring the evidence in the record. The Court turned §1988 and Christiansburg on their heads. But for the whole case, the Court's

findings of January 17, 1985 would represent reasoned discretion.

In the face of the uncontroverted evidence supporting the Petitioner's case, the Court at A-11 found the restraint of the Petitioner was consistent with time, place and manner regulations. This was issue of ultimate fact which Petitioner ought to have been allowed to present to a jury.

There was nothing wrong with this suit, yet the Court and the Eleventh Circuit said Petitioner had no right to bring it. The punishment of a strong First Amendment suit is an "exaction" --a punishment--for the citizen fighting for a right to speak where he had that right.

The ruling tends to place the governance of the First Amendment under the governance of congressional statute though the First Amendment supercedes §1988, and not the other way around.

The ruling adopted by the Eleventh Circuit holds that a citizen does not have the right to test in federai court prior restraint at a state forum inviting pure speech on the most important political questions of the day. The

attorney fee award, upheld by the Eleventh Circuit, cuts the heart out of the First Amendment and re-writes the Constitution. Surely the Court and the Eleventh Circuit do not mean to suggest this suit, founded in fact and law, would have been all right if an attorney had brought it, but it was not all right when brought pro se.

C. The Reasons cited in Support of the Award are Clearly Erroneous as Findings of Fact, and Erroneous as a Matter of Law. There Being no Factual or Legal Basis, the Award is Irrational.

The reasons for the decision must be susceptible to analysis by the reviewing court. In matters of discretion, administrative or judicial, the reviewing court must find "reasoned discretion, with reasons that do not deviate from ascertainable legislative intent." Greater Boston Television Corporation v F.C.C., 444 F. 2d 841, 850 (D.C. Cir. 1970), cert denied 403 U.S. 923, 91 S. Ct. 2229, 29 L. Ed. 2d 701 (1971). The legislative intent of §1988 "is to ensure 'effective access to the

judicial process' for persons with civil rights grievances." Hensley v Eckerhart, 461 U.S. 424, 103 S. Ct. 1933, 76 L. Ed. 2d 40, 48 (1983), citing HR Rep No. 94-1558, p1 (1976).

In the Order on pages A18-A21, the Court sets out the reasons for finding the action frivolous: 1) The Petitioner prolonged the litigation; 2) he had no legal expenses or fees; 3) the regulations at the town meeting were reasonable and the Petitioner could have spoken; and 4) the Petitioner applied for the wrong remedy.

1. The Petitioner did not prolong this suit.

Opposing counsel shows Plaintiff's pleadings did not delay: "...once the underlying facts of the case were established, the application of law to facts did not present a difficulty in establishing the State Defendant's case...Through counsel's efforts, the State Defendant's case was presented clearly, and by means of a motion for summary judgement, in a minimum amount of time." (III at 865)

Believing he was going to easily prove

all that he alleged, in the interest of judicial economy, Plaintiff suggested to the Court a conference of the parties for the purpose of amicable settlement. (Appendix A-2 , Appeal Brief to Eleventh Circuit).

2. The Petitioner incurred relatively great fees, costs and expenses.

In an affidavit (A- 3, Appeal Brief to Eleventh Circuit), the Petitioner showed the Eleventh Circuit his fees, costs and expenses totalled $8607.00. The Petitioner bore this litigation alone, unaided by a foundation or the ACLU. He is a family practitioner-pediatrician in center city of Savannah and of modest income (IV at 1021-1027). There is no evidence Petitioner's pleadings or amendments increased the fees and costs of Defendants.

3. There were no time, place and maner regulations at the town meeting; and the Petitioner was precluded from speaking.

Ms. Jones Ratterree shows in her deposition that "there were no rules;" "citizens

There being no factual or legal basis for the award, the discretion exercised here was of the wrong kind: "...unknown...different in different men...casual, and depending upon constitution, temper and passion. In the best, ...caprice; in the worst, it is every vice, folly and passion to which human nature is liable." Delno v Market St. Ry. Co., supra, at 967, quoting L. Bouv. Law Dict., Rawles Third Edition, p. 885.

There being no rational factual or legal foundation for the attorney fee award, the decision rendered is arbitrary, unreasonable and irrational, constituting a clear abuse of discretion.

Delno v Market St. Ry., supra; Greater Boston Television Corporation v F.C.C.,

supra; Lindy Bros. Builders, Inc. v American Radiator and Standard Sanitary Corp., supra; Napolitano v Compania Sud Americana De Vapores, 421 F. 2d 382 (2nd Cir. 1970); Sears, Roebuck and Co. v American Mut. Liab. Ins. Co., 372 F. 2d 435, 438 (7th Cir. 1967).

II. THE AWARD IS GROSSLY UNFAIR AND INEQUITABLE, CONSISTING IN GOOD PART OF SHAM BILLINGS BY ONE DEFENDANT'S COUNSEL; IS INCONSISTENT WITH LAW FROM ALL THE CIRCUIT COURTS AND WITH SUPREME COURT DOCTRINE AND WILL CHILL THE PRIVATE ENFORCEMENT OF CIVIL RIGHTS LAWS.

The award is so inequitable and unfair that even if the First Amendment was not injured here, the Supreme Court is invited to ensure justice.

A. The Award Appears to be a Vindictive Punishment.

The purpose of the Attorney's Fees Award Act is to encourage the private enforcement of the civil rights laws. The court closest to the scene has a "superior understanding of the litigation," Hensley v Eckerhart, 461

U.S. 424, 76 L. Ed. 2d 40, 53, 103 S. Ct. 1933 (1983), "was particularly qualified to perform the balancing of equities that is an integral part of the proceedings;" P. Mastrippolito and Sons, Inc. v Joseph, supra, at 1387.

On the one hand we have counsel for the State Attorney General's Office and counsel for the Historic Savannah Foundation and the Georgia Endowment for the Humanities who had chosen to represent their clients pro bono. They engaged in no affirmative discovery (III at 864).

On the other hand we have a pediatrician and family practitioner of modest income who proceeded pro se, who, believing he was going to easily prove his case, suggested a conference with a view toward amicable and common sense settlement (A-2, Appeal Brief Eleventh Circuit). He was the workhorse of the litigation, essentially proving in discovery all he alleged. He spent $8607.01, more than the costs and expenses of all of the Defendants combined.

In all of these extraordinary circumstances, the Court was willing to use §1988 as a means

for punishing this litigant--by saddling him with an extra $34,000 in fees and costs, which would visit financial chaos upon all but few citizens.

B. The Bill from Counsel for the Georgia Endowment for the Humanities is Padded and a Sham, and an Embarrassment to the Bar.

"Counsel for the prevailing party should make a good faith effort to exclude from a fee request hours that are excessive, redundant or otherwise unnecessary..." Hensley v Eckerhart, 461 U.S. 424, 76 L. Ed. 40, 51, 103 S. Ct. (1983).

Counsel for GEH, Mr. Jacobs, fifty years at the bar, bills at a rate of $100 per hour for his "receipt and reviewing" and performing telephoning, which is "double dipping." "A Michaelangelo should not charge Sistine Chapel rates for painting a farmer's barn." Ursic v Bethlehem Mines, 719, F. 2d 670, 677 (3rd Cir. 1983).

Counsel for the Georgia Endowment for the Humanities (GEH) did the least work of the

Defendants on this case. Counsel relied upon the pleadings of co-Defendant's counsel (IV at 1169), but GEH presented the largest bill. (Order, pages A-27, A-32). The GEH bill represents time of two attorneys in innumerable "receipt and review" skull sessions (Ursic, at 677), and telephone calls of very dubious benefit to the client. GEH bills for more time on the attorney fee award--99 hours--than spent on the whole case--77 hours.

So many of the billings submitted by the counsel for the GEH are obviously improper that they can not be accepted as a "rational reflection of services performed." Church of Scientology of California v Cazares, 638, F. 2d 1272, 1292 (5th Cir. 1981)

The GEH bill is padded, as is obvious from common sense inspection. It is not a serious document, though accompanied by sworn affidavits, and never in fairness would have been presented to the client.

C. It Appears the Court Did Not Examine the Billings.

While it is unreasonable to expect the Court to go over each billing in great detail, "...the Court must satisfy itself of the overall fairness and reasonableness of the fee under all circumstances." Lund v Affleck, 587 F. 2d 75, 77 (1st Cir. 1978)

There being so many billings which are impermissible under Johnson v Georgia Highway Express, 488 F. 2d 714 (5th Cir. 1974), it is hard to conclude other than the court did not examine these billings, but simply passed them on to the Petitioner, a clear abuse of discretion and a misuse of §1988.

D. The Order Defeats the Purpose of Section 1988 and Tends to Close the Courthouse Door to Middle Class Citizens.

The legislative purpose of the Attorney's Fees Act is to ensure the effective enforcement of the civil rights laws, the Act "shifting the costs of litigation from civil rights victim to civil rights violator." Dowdell v City of

Apopka, 698 F. 2d 1181, 1189 (11th Cir. 1983), a cost shifting which has already occurred here, except in reverse, this pro se litigant having for all intents and purposes underwritten the litigation.

In Isaacs v Temple University, 467 F. Supp. 67 (E.D. Pennsylvania 1979), former employees alleged violations of First Amendment and due process rights in their termination from the University. At trial there were close questions of fact and law:

> The doors to the federal courthouses must remain open to all who have justifiable federal causes of action. They must remain open not only to the rich and the poor, but also to multitudes in between who do not qualify for publically supported legal aid, and who can afford the ever increasing costs of legal services only by great personal sacrifice. To impose upon plaintiffs the customarily not immodest claims of their opponents for counsel fees as a penalty for not convincing the fact finder by a preponderance of the evidence, would in my estimation, effectively barricade the courthouse doors to all middle income civil rights plaintiffs except those with the most reckless gambling natures. (Isaacs v Temple University, supra, at 70.)

Here the Court extraordinarily punished

a strong First Amendment suit, the award so inequitable and unfair as to constitute a clear abuse of judicial discretion.

In the public interest and in the interest of the bar of the federal courts, the billings of counsel of the GEH invite discipline by the Supreme Court under the inherent power of this Court to impose sanctions for bad faith conduct. Roadway Express, Inc. v Piper, 447 U.S. 752 (1980), and Rule 11 of the Federal Rules of Civil Procedure.

CONCLUSION

The lifeblood of the democracy is vigorous discussion of all important questions. And whenever citizens attempt to avail themselves of the right to speak freely, there will always be attempts to restrain them. In the hubris of everyday life, under various cloaks and in various disguises, discrimination will always be applied against provocative and unsettling ideas.

Man is not a tolerant animal, and the hostility to foreign ideas is almost a biologic

instinct. Some new ideas will be helpful and adopted; others will be discarded and maybe taken up another day.

> It is good that new ideas should be heard, for the sake of the few that can be used; but it is also good that new ideas should be compelled to go through the mill of objection, opposition, and contumely; this is the trial heat which innovations must survive before being allowed to enter the human race. [Durant, Will and Ariel Durant, The Lessons of History (New York: Simon and Schuster, 1968), p. 36.]

This case represents the ultimate First Amendment issue. The sovereign state in modern dress, in the form of the State of Georgia and a private friend, has tried to control what citizens can say.

Citizens wishing to express controversial ideas face a restricted range of possibilities. The Rotarians, the Sunday television programs, the speakers' bureaus, and newspapers editors generally do not invite expressions of ideas foreign to ones the majority holds dear. "...it has taken centuries to persuade the

most enlightened peoples that liberty to publish one's opinions and to discuss all questions is a good and not a bad thing." (Bury, J.B., A History of Freedom of Thought, Home University Library Ed., 1952, p. 2.) There is the wrong position on the Westway controversy, and then there is the position of the editors of The New York Times, so say the editors of the Times.

The citizen who takes society to task can not realistically expect society to provide a pulpit. He will have to search diligently for forums--exclusive of street corners--where he may express ideas and give them flight so that they have any chance of influencing public opinion on questions of importance. Who, after all, is going to knowingly provide a forum to a speaker to wants to say that drug trafficking has corrupted Savannah civic and commercial life.

The State of Georgia and the Historic Savannah Foundation created, then, quite a prized event in inviting citizens to come and

discuss--after the pageant--the most important questions: Where had Savannah been?; Where is she now?; and Where do we want her to go in the future? Aren't these the most important questions for a man who loves his city to consider?

It will always be claimed that the speaker with the difficult or unpopular idea came to the wrong place to express it. It would have been better for this speaker to talk about political corruption in the lobby of an ampitheater; it would have been better still if he had spoken in the park. Heaven forbid that a critic of society should take seriously an invitation to address the successes and failure of his city and state.

The circumstances described are the arcane circumstances in the everyday world where real forums are created. If citizens do not fight for their rights to speak freely at them, their rights will atrophy, and it is the democracy which will suffer. Failing non judicial re-

dress, this citizen had more than a right to bring this action; he had a duty to bring it.

The Court, with the concurrence of the Eleventh Circuit, has taken the position that it is constitutionally permissible to restrain a citizen at a state forum upon the worry that he might be controversial. Since there was no constitutional wrong in this restraint, the Petitioner was in the wrong for so claiming, and must be punished.

The decisions below hold in effect that in the Eleventh Circuit, a citizen does not have the right to discuss corruption and drug trafficking at a forum established by the State of Georgia and the Historic Savannah Foundation.

But there is no political idea which may be legitimately suppressed through the exercise of prior restraint at a state forum inviting discussion on important ideas. And there is no association between a state and a private party which precludes the exercise of rights under the First Amendment when the private party and the state get together.

Something happens to the law when a strong First Amendment suit is throttled by technicalities and the nigh impossible odds of having reversible error actually reversed. The law dies a little; cynicism about the law and courts grows evermore. The law, after all, like medicine, is deductive and springs up from work-a-day circumstances to pragmatic truths. The law must work and must be understood as working. The First Amendment doesn't belong on a dusty shelf. to be taken off just for Law Day and high school Civics classes.

What kind of law would it be in the upholding of decisions which ignore the law of the First Amendment and civil rights attorney fee awards?

No where in the decisions below will the reader find that any important issue was raised here, that a right was raised for which we fight and die.

Given all of the circumstances here--the improper restraint at a state forum, the Court's encouragement, the high standard of

"proof" of Petitioner's case, the use of improper standards and procedures; the inequitable and unfair punishment, the decisions below are in direct conflict with Circuit law and Supreme Court decisions such that they should be reversed.

RELIEF ULTIMATELY SOUGHT

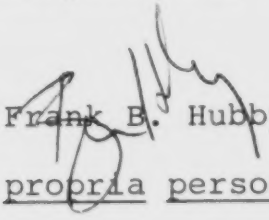
1. Petitioner believes that this Court should rule that the attorney fee award was improper and that the decisions of the United States Court of Appeals for the Eleventh Circuit and the District Court must be reversed.

2. The Petitioner believes that this Court should rule that he be awarded costs, fees and expenses of litigating the attorney fee award.

3. The Petitioner believes this Court should now rule that the District Court erred in granting summary judgement, and the decisions of the United States Court of Appeals for the Eleventh Circuit and the District Court must therefore be reversed with instructions to hear and determine this cause.

4. The Petitioner believes that this Court should exercise its disciplinary powers regarding the padded and sham billings of counsel for the GEH.

Respectfully submitted,



Frank B. Hubby
propria persona
321 East Hall Street
Savannah, GA 31401
(912) 232-5511

APPENDIX

Anthony A. Alaimo
Judge, United States District Court
Brunswick, Georgia

March 4, 1983

Dr. Ben Hubby
321 East Hall Street
Savannah, Georgia 31401

Dear Dr. Hubby:

On the contrary, no apology is due from you. I enjoyed hearing you and I confess that your statement was a fine a one on First Amendment rights as I have heard in many a day.

Good luck to you on your appeal.

Sincerely,

s/Anthony A. Alaimo

mcc

In the United States District Court
For The Southern District of Georgia
Savannah Division

FRANK B. HUBBY, M.D.,	:	CIVIL ACTION
Plaintiff	:	
V.	:	
HISTORIC SAVANNAH FOUNDATION, INC.; GEORGIA ENDOWMENT FOR THE HUMANITIES, INC.; GEORGIA SEMIQUINCENTENARY COMMISSION,	:	
Defendants	:	NO. 483-066

O R D E R

Presently before this Court are the motions of defendants, the Historic Savannah Foundation, Inc. ("HSF"), the Georgia Endowment for the Humanities, Inc. ("GEH"), and the Georgia Semi-quincentenary Commission ("GSC"), for attorney's fees and costs against plaintiff, Dr. Frank B. Hubby. Although originally brought as a request for a temporary restraining order, this action later was converted by plaintiff into a claim for more permanent equitable relief pursuant to 42 U.S.C. §1983. These motions mark the postscript to the long, tedious and futile

litigation conducted by Hubby in his pursuit for what he claimed to be vindication of his constitutionally protected right to be heard. Having been defeated at every point in his campaign, the time has come for Dr. Hubby to pay the piper.

The Court has read and considered the plethora of pleading materials and briefs which have come before it and has concluded that the motions should be sustained and that attorney's fees and costs should be assessed against Dr. Hubby. What follows is an overview of the tortuous path followed by this two-year suit from its inception.

BACKGROUND

In February of 1983, HSF, a Georgia corporation formed under the laws of the State of Georgia, planned to hold several events in honor of the state's semiquincentenary anniversary. Among these events were two "Colonial Town Meetings" to be held during "Georgia Week" in Savannah beginning Sunday, February 6, 1983, and ending Sunday, February 13, 1983. At these

meetings, citizens of and visitors to Savannah were encouraged to meet and converse with actors cast as representative characters out of Georgia's historic past. The invitations to these meetings indicated that such notable historical figures as James Oglethorpe, John Martin Boltzius and Samuel Nunes would be present to lead the meetings. The invitations made it quite clear that these meetings were to be limited to theatrical performances to be followed by a short and informal question-and-answer period.

In anticipation of these events, Dr. Hubby had prepared a statement which he desired to recite at one of the productions. His remarks were aimed largely at many of the contemporary problems confronting Savannah, at times with graphic specificity. Plaintiff offered a draft of his remarks to the producers of the "Town Meeting." Apparently, plaintiff's offer initially was accepted by certain unspecified employees of the defendants but then later rejected. The record makes certain, however, that although the organizational staff declined

to include Dr. Hubby's speech in either of the meetings, the defendants in no way barred plaintiff from participating in the open question-and-answer sessions following the presentation by the colonial actors.

After his request to deliver a speech at these Town Meetings had been officially rejected, Dr. Hubby filed a complaint with this Court on Friday, February 11, 1983, seeking a temporary restraining order. Plaintiff alleged that, by prohibiting him from delivering his speech, defendants abridged his First Amendment right to be free to express his views at the meetings. On Saturday, February 12, 1983, this Court held a special hearing in which Dr. Hubby was permitted to air his views in extenso. For forty-five minutes plaintiff conducted "an impassioned, eloquent, cohesive and appealing...argument in which he set forth the substance of his suppressed speech--essentially, a political polemic on the sad state of the current local government, charged to be not only oblivious to but betraying the spirit of the founders of the Colony." Order

on Application for a Temporary Restraining Order, S.D.Ga. CV 483-066, at 4 (filed February 6, 1983). After hearing all the evidence, the Court entered its oral Order denying plaintiff's complaint for a temporary restraining order. Id.

The final events of "Georgia Week" in Savannah ended the next day on Sunday, February 13 1983. Nevertheless, plaintiff prosecuted his appeal during the following week to the United States Court of Appeals for the Eleventh Circuit for an emergency hearing on the denial by this Court of plaintiff's request for extraordinary relief. On February 23, 1983, the Eleventh Circuit refused to disturb that denial of relief. Thereafter, plaintiff sought an emergency review by the United States Supreme Court, but his request was denied summarily by Justice Powell in a memorandum decision on March 3, 1983.

On March 7, 1983, plaintiff returned to this Court seeking equitable relief of a more permanent nature. More specifically, plaintiff requested a jury trial and oral argument on all

motions brought pursuant to his complaint for injunctive relief filed February 11, 1983. In response, defendant GSC moved to dismiss plaintiff's complaint on the following grounds: (1) the complaint failed to state a claim upon which relief could be granted; (2) the issues presented in this case were already mooted by the conclusion of the Georgia semiquincentenary celebration; and, (3) plaintiff failed to effect proper service of process pursuant to Fed. R. Div.P. 12(b) (1). Defendants HSF and GEH each filed its own independent motion to dismiss, and the Court held a hearing on these motions on March 24, 1983.

On May 5, 1983, the Court denied defendants' motions. In rejecting defendants' mootness argument, the Court construed plaintiff's pro se complaint liberally, Haines v. Kerner, 404 U.S. 519, 92 S.Ct. 594, 30 L.Ed.2d 652, reh'g denied, 404 U.S. 948, 92 S.Ct. 963, 30 L. Ed.2d 819 (1972), and concluded that the plaintiff had requested more than the mere equitable relief identified by the defendants in their

briefs. In fact, plaintiff had demanded that he receive "such other and further relief as this Court deems equitable and appropriate." Plaintiff's Complaint at 5 (filed February 11, 1983). The Court interpreted this phrase to mean that plaintiff's prayer encompassed a claim for damages for the alleged infringement of his First Amendment rights and denied the defendants' motions on this ground.

With regard to defendants' Rule 12(b)(6) assertion, the Court applied the Conley v. Gibson test in finding that plaintiff had offered a set of facts to support his claim that the "Colonial Town Meeting" was a public forum affording him a First Amendment right to express his views at the meeting. See Conley v. Gibson, 355 U.S. 41, 45-56, 2 L.Ed.2d 80, 84 (1957). Finally, the Court rejected the defendants' motion to dismiss based on inadequate service of process because plaintiff had corrected any deficiency which may have occurred.

Then, on August 15, 1983, after months of discovery, plaintiff moved this Court for leave

to file an amended complaint so as to claim damages for violation of his civil rights under 42 U.S.C. §1983. The Court granted plaintiff's motion two days later on August 17. Two weeks later, on August 31, 1983, plaintiff again sought leave from this Court to amend his pleadings so as to name B. H. Levy, the Chairman of the GSC, as a codefendant. Finding that the addition of Levy to these proceedings at that point did not in any material way alter the posture of the case, the Court acceded to plaintiff's request shortly thereafter. Order of September 6, 1983. On September 16, plaintiff sought leave for the third time to add as defendants all individual members of the above-named commissions and corporations. In this instance, however, the Court refused to permit the addition of the other 24 members of the Commission as defendants. Noting that plaintiff had brought his motion "on the very eve of scheduled pretrial conferences," the Court stated that granting plaintiff's motion "would...burden the defense with more than substantial preparation for trial." Order

of September 30, 1983, at 2. Furthermore, because discovery had been closed for some time by operation of Local Rule 7, the Court refused to "tolerate the haphazard disruption of its calendar to accommodate the unduly delayed pleading efforts of the plaintiff." Id.

In the meantime, all the defendants moved this Court for summary judgment and on October 4, 1983, the Court heard oral argument of these outstanding motions. In ruling on these motions, the Court addressed three issues: (1) whether the GSC or any of its members were involved in the "Colonial Town Meetings" in their official capacities sufficiently to characterize the meetings as being state action; (2) whether the GEH and the HSF, or their respective members, may be held liable under §1983 for their actions during the Savannah meetings; and, (3) whether the presentation of the "Colonial Town Meetings" created a public forum supporting legal recognition of plaintiff's First Amendment rights. Upon consideration of the various roles each defendant played in the presentation of the Town

Meetings, the Court concluded that defendants were not acting pursuant to state direction, as an agent of the state or otherwise "under color of state law" when plaintiff's request to give a speech at those meetings was denied. The Court further held that plaintiff suffered no denial of his civil rights under §1983 because the Town Meetings did not present a constitutionally protected forum in which the plaintiff was guaranteed the right to exercise his First Amdnement privilege to freedom of speech. More specifically, the Court found that the HSF had imposed permissible restrictions on the conduct of speech at the historical reenactment of a colonial town gathering by excluding those prepared remarks by the audience which were inconsistent with the theatrical nature of the presentation. Order of November 23, 1983, at 9-10; see also Cox v. Louisiana, 379 U.S. 536 (1965) (a state may limit a private individual's otherwise permissible First Amendment right to freedom of speech with reasonable restrictions as to the time, place and manner of presentation).

Accordingly, on November 23, 1983, the Court sustained defendants' motions for summary judgment.

On November 29, 1983, plaintiff filed a notice of appeal requesting a hearing en banc before the Eleventh Circuit Court of Appeals. On May 2, 1984, a panel of the Eleventh Circuit summarily denied plaintiff's appeal and costs were taxed against him. On July 13, 1983, this Court made the judgment of the Court of Appeals the judgment of the Southern District of Georgia. Thereafter, Hubby's petition for certiorari was denied by the United States Supreme Court.

In the interim, all defendants in this action moved the Court for an award of attorney's fees and costs. Since that time, the parties have engaged in a seemingly endless colloquy producing more than thirty-five pleading materials on these and related issues. Having reviewed the entire record again, the Court now finds the matter ripe for disposition.

DISCUSSION

All three defendants have moved for a fee award pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. GEH has also prayed for an award of attorney's fees against plaintiff acting as counsel. To reach this result, GEH invokes the Court's inherent power to assess fee awards against counsel, see Roadway Express Inc. v. Piper, 447 U.S. 752, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980), and the statutory authority granted this Court under 28 U.S.C. §1927. Finally, GEH has also requested enhancement of 50% in the calculation of any attorney's fee it is owed.

The Court, having concluded that Dr. Hubby is liable for a fee award under §1988, finds it unnecessary to determine plaintiff's potential liability under alternative theories.

A. Dr. Hubby's §1988 Liability

The Civil Rights Attorney's Fees Awards Act of 1976 provides federal courts with authority to grant prevailing parties in civil rights actions a reasonable attorney fee as part of the

cost of litigation:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title...the court, in its discretion, may allow the prevailing attorney's fee as part of the costs.

42 U.S.C. §1988. It has become well established that a prevailing defendant[1/] in a civil rights action may be awarded attorney's fees only when the plaintiff's claim is "frivolous, unreasonable or without foundation, even though not brought in subjective bad faith." Christiansburg Garment Co. v. E.E.O.C., 434 U.S. 412, 421-422, 98 S.Ct. 694, 54 L.Ed.2d 648 (1978); see also Hughes v.

[1/] In contrast, prevailing plaintiffs in civil rights actions typically are permitted fee awards unless "special circumstances would render such an award unjust." Newman v. Piggie Park Enterprises, 390 U.S. 400, 402, 19 L.Ed.2d 1763, 1766 (1968)(class action brought under Title II of the Civil Rights Act of 1962, §204 (a), 42 U.S.C. §2000a-3(a)). See also Roadway Express, supra, where the Supreme Court suggested that the distinction between plaintiffs and defendants "advances the congressional purpose to encourage suits by victims of discrimination while deterring frivolous litigation." Id. at 762, 65 L.Ed.2d at 498.

Rowe, 449 U.S. 5, 14, 101 S. Ct. 173, 66 L. Ed. 2d 163, 173 (1980); Roadway Express, Inc. v. Piper, supra; Beard v. Annis, 730 F.2d 741 (11th Cir. 1984); B & J Music Inc. v. McAuliffe, 719 F.2d 1536 (11th Cir. 1983); E.E.O.C. v. Pet Inc., Funsten Nut Division, 719 F.2d 383 (11th Cir. 1983); Doe v. Bushbee, 634 F.2d 1375 (11th Cir. 1982); Greyhound Lines, Inc. v. Cobb County, Georgia, 681 F.2d 1327 (11th Cir. 1982); Chruch of Scientology of California v. Lazares, 638 F.2d 1272 (5th Cir. 1981); Jones v. Dealers Tractor and Equipment co., 634 F. 2d 180 (5th Cir. 1981); Harris v. Plastic Manufacturing Co., 617 F.2d 438 (5th Cir. 1980); Crawford v. Western Electric Co., Inc., 614 F.2d 1300 (5th Cir. 1980); EEOC v. First Alabama Bank of Montgomery N.S., 595 F.2d 541 (5th Cir. 1979); Lopez v. Aransas County Independent School District, 570 F.2d 541 (5th Cir. 1978).

The Christiansburg standard has been held applicable to claims arising under §1988 for attorney's fees. Jones v. Dealers Tractors and Equipment Co., supra; Crawford v. Western

Electric Co., Inc., supra; Lopez v. Aransas County Independent School District, supra. See also S. Rep. No. 1011, 94th Cong., 2d Sess. 2, 2-4, reprinted in 1976 U.S. Code Cong. & Ad. News 5908, 5910-12. Defendants in this action are, therefore, entitled to an award of attorney's fees if, without regard to the existence of subjective bad faith on the part of the plaintiff,[2/] the action initiated was "frivolous, unreasonable, or without foundation."

In applying this standard, the Christiansburg Court admonished district courts to:

> resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not prevail ultimately, his action msut have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most

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[2/] The Christiansburg Court noted that if "a plaintiff is found to have brought or continued...a claim in bad faith there will be an even stronger basis for charging him with the attorney's fees incurred by the defense." 433 U.S. at 421, 54 L.Ed.2d at 657 (emphasis in original).

> airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 422, 54 L.Ed.2d at 657. Although acknowledging the need to deter meritless litigation, the Supreme Court nevertheless was concerned that assessing counsel fees against plaintiffs would "substantially add to the risks inherent in most litigation and would undercut the efforts of Congress to promote the vigorous enforcement of the provisions of Title VII." 434 U.S. at 422, 54 L.Ed.2d at 657. Cf. Roadway Express, 447 U.S. at 752, 762, 65 L.Ed.2d at 488, 498 (prevailing plaintiff-defendant distinction "advances the Congressional purpose to encourage suits by victims of discrimiantion while deterring frivolous litigation.")

Consistent with the Supreme Court's admonitions, this Court in the past has been reluctant to exercise its authority under §1988 to grant prevailing defendants counsel fees in civil rights actions. See, e.g., Daniels v. Motel Properties, Inc., et al., No. CV 283-195 (S.D.Ga., August 27, 1984)(Order denying attorney's fees to prevailing defendants in a Title VII suit); Pasley v. The City of Jesup, Georgia, et al., No. CV 283-176 (S.D.Ga., August 7, 1984)(Order denying attorney's fees to defendants in §1983 action); Jones v. Gilman Paper Company, et al., No. CV 283-006 (S.D.Ga., July 12, 1984)(Order denying defendants a fee award in a Title VII suit). Unlike these cases, the record in the case sub judice provides overwhelming factual support for an award of fees against the plaintiff.

Dr. Hubby has struggled tooth and nail in his quest to be heard. He has endeavored to invoke nearly every channel of relief available to him, including a request for an emergency review by the United States Supreme Court and

a rehearing en banc by the Eleventh Circuit Court of Appeals. His persistence has been undying and his determination as strong and as confident as when he issued his first diatribe before this Court on a Saturday morning nearly two long years ago.

Dr. Hubby, an undergraduate of Princeton and a graduate in medicine of the University of Virginia, is a highly intelligent professional man. His ingenuity is amply demonstrated by his ability to protract this lawsuit for as long as he did without any formal legal training or counsel. As an intelligent learned man, however, Dr. Hubby must have known that his quest to be heard could be pursued only at substantial cost. In fact, Dr. Hubby, as a practicing physician, is aware that professional services generally are rendered only for a considerable fee. While he proceeded pro se, and thus incurred no legal fees, his unwilling victims have expended a great deal of time, energy and money in the defense of this action.

Dr. Hubby blatantly has disregarded the

cost of his litigious exercise to both the defendants and to society. Long after the time had passed when Dr. Hubby could have obtained the relief he sought--viz., injunctive relief requiring defendants to allow him to be heard at the Colonial Town Meetings--he nevertheless pressed on with his lawsuit. Construing plaintiff's complaint liberally, as the Court must in a pro se case, the Court permitted Dr. Hubby a reasonable period of time in which to initiate this action and conduct any necessary discovery. But, at every juncture along the way, plaintiff founds ways to prolong the case, thereby creating even greater litigation costs.

Shortly after his complaint had been filed, it should have become clear to plaintiff that this action was "frivolous, unreasonable, [and] without foundation." Plaintiff's complaint invited the Court to ignore reasonable restrictions on the conduct of speech at a theatrical reenactment of a colonial town gathering and hold that the defendants intended to create an

open forum at those meetings. In granting defendants' motion for summary judgment, the Court found that plaintiff "[had] not been foreclosed from presenting his views to the public; he merely was not allowed to interject them into a presentation of his own choosing." Order of November 23, 1983, at 10.

In sum, it must have been apparent to Hubby shortly after the commencement of his claim that his pursuit was plainly an exercise in futility. Doubtless, his claim was "frivolous, unreasonable or without foundation" even though not brought in subjective bad faith.

For these reasons, the Court concludes it prudent in this case to award the defendants a reasonable fee pursuant to the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. §1988. Defendants' motion for attorney's fees with regard to this statutory provision will, therefore, be granted.

B. Costs and Attorney's Fees to be Awarded

1. Lodestar Analysis

The only issue which remains for the Court

involves the computation of the costs and fees to be awarded to the defendants. In determining the amount of defendants' fee award, the Court is guided by recent Supreme Court and appellate decisions construing the reasonable fee provisions of §1988. See, e.g., Blum v. Stenson, ____U.S.____, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984); Hensley v. Eckerhart, 461 U.S. 42 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983); see also Murray v. Weinberger, 741 F.2d 1423 (D.C. Cir. 1984); Carmichael v. Birmingham Saw Works, 7 F.2d 1126 (11th Cir. 1984); Copeland v. Marshall, 641 F.2d 880 (D.C. Cir. 1980)(en banc).

In Hensley v. Eckerhart, supra, the Supreme Court held that any fee-setting inquiry must commence with the "lodestar figure," an amount equal to the number of hours reasonably expended multiplied by a reasonable hourly rate. 76 L. Ed.2d at 50; accord Murray v. Weinberger, supra, at 1427; Copeland v. Marshall, supra, at 890-91. The number of hours reasonably expended on behalf of the prevailing party is the

total amount of hours minus any unproductive time spent on unsuccessful claims--hours which are "excessive, redundant, or otherwise unnecessary." Hensley, 103 S.Ct. at 1040, 76 L.Ed.2d at 51; Murray, supra, at 1427; Copeland, supra, at 891. The reasonable hourly rate may be determined according to the prevailing market rate in the relevant community. Blum, 104 S.Ct. at 1547, 79 L.Ed.2d at 901-03; Murray, supra, at 1427. According to the Supreme court, this "lodestar figure" should produce "a fully compensatory fee" in any case in which "excellent results" were obtained. Hensley, 103 S.Ct. at 1941; 76 L.Ed.2d at 52. Accord Blum v. Stenson, 104 S.Ct. at 1058, 79 L.Ed.2d at 901 (the "'product of reasonable hours time a reasonable rate' normally provides a 'reasonable' attorney's fee within the meaning of the statute [42 U.S.C. §1988]"), citing Hensley v. Eckerhart, supra.

The Hensley Court also noted that the calculation of the lodestar "does not end the inquiry. There remain other considerations that may lead the district court to adjust the fee

upward or downward..." 103 S.Ct. at 1940, 76 L.Ed.2d at 51. In some cases of "exceptional success an enhanced award may be justified." 103 S.Ct. at 940, 76 L.Ed.2d at 52. Recently, however, the Supreme Court retreated somewhat in Blum v. Stenson, supra, stating that it is "the rare case in which an upward adjustment to the presumptively reasonable fee of rate times hours is appropriate..." 104 S.Ct. at 1550 n.18, 79 L.Ed.2d at 903 n.18.

The Blum holding exacts "a heavy burden on a fee applicant to justify any increase in the lodestar figure," Murray, supra, at 1428; see Blum v. Stenson, 104 S.Ct. at 1548-49, 79 L.Ed.2d at 901 (the "burden of proving that such an adjustment is necessary to the determination of a reasonable fee is on the fee applicant"), and this burden is satisfied only if the applicant makes a specific claim for an upward adjustment based on a particular factor. 104 S.Ct. at 1548-49, 79 L.Ed.2d at 901. The United States Court of Appeals for the District of Columbia Circuit has construed the Blum

holding to suggest that such claims "must be supported by 'specific evidence' of the need for an enhancement of the lodestar." Murray, supra, at 1428. Thus, in Blum, the Supreme Court reversed a district court's grant of an enhancement of the lodestar because the fee applicants had introduced "no evidence supporting an upward adjustment to fees calculated under the basic standard of reasonable rates times reasonable hours." 104 S.Ct. at 1450, 79 S.Ct. at 901. See National Association of Concerned Veterans v. Secretary of Defense, 675 F.2d 1319, 1323, 1328-29 (D.C. Cir. 1982)(fee applicant must provide specific support for any upward adjustment of the lodestar rate which the applicant requests).

Should the district court determine that such an increase is warranted, then it may rely on such factors as the results obtained by the prevailing party, Hensley v. Eckerhart, 103 S.Ct. at 1940, 76 L.Ed.2d at 51, or any of the other twelve factors identified in Johnson v. Georgia Highway Express, Inc., 48 F.2d 714, 717-719

(5th Cir. 1974), in reaching the correct amount of fees to be awarded.[3/] Because this Court does not feel that such an enhancement is warranted in this instance, no adjustment to the lodestar will occur. Nonetheless, the Court has outlined the Johnson factors and has followed the procedureal requirements mentioned in Matter of First Colonial Corp. of America, 544 F.2d 1291, 1298 (5th Cir.), cert. denied, 431 U.S. 904, 52 L.Ed.2d 388 (1977); accord Fitzpatrick v. Internal Revenue Service, 665 F.2d 327, 331 (11th Cir. 1982), in reaching the

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[3/] The Supreme Court in Hensley v. Eckerhart noted that many of the Johnson factors usually are subsumed within the initial calculation of hours reasonably expended at a reasonable hourly rate. 79 L.Ed.2d at 51, citing Copeland v. Marshall, 641 F.2d 880, 890 (D.C. Cir. 1980) (en banc).

same conclusion.[4/]

2. Calculation of the Fee Award

Defendant HSF has prayed for an award of $14,136.05--$798.05 in costs and expenses and $13,338.00 (156 55/60 hrs. @ $85/hr.) in fees. Defendant GEH has requested an award of $15,756.59 --$544.09 in costs and expenses and $15,212.50 (93.7 hrs. @ $75/hr. and 81.85 hrs. @ $100/hr.) in fees. Finally, defendant GSC has asked for a total of $5,962.45--$1,279.95 in costs and expenses and $4,682.50 (122.75 hrs. @ $30/hr. and 25 hrs. @ $40/hr.) in fees. The total amount defendants have requested is equal to $35,855.09.

[4/] Prior to the recent Supreme Court decisions in Blum v. Stenson, supra, and Hensley v. Eckerhart, supra, the old Fifth Circuit Court of Appeals had suggested that district courts should pay special attention to four particular factors in the Johnson analysis when computing a fee award. See Copper Liquor, Inc. v. Adolph Coors Co., 624 F.2d 575, 585 (5th Cir. 1978); Mitchell v. Scheepvaart Maatschappij Trans-Ocean, 579 F.2d 1274 n.10 (5th Cir. 1978); Matter of First colonial Corp. of America, supra, at 1299-1300. Those factors, as listed in Johnson, are: (1) the time and labor required; (5) the customary fee; (8) the amount involved and the results obtained; and (9) the experience, reputation and ability of the attorneys. It may be, however, that these four factors are subsumed within the lodestar analysis developed by the recent supreme Court decisions. See supra note 5.

Each defendant's counsel has submitted several affidavits indicating the exact number of hours spent in preparation of the defense in the instant case. After reviewing those affidavits, this Court finds the time expended by counsel to be reasonable and appropriate for the preparation of an adequate defense. The Court is aware of no duplication of billable hours by defendants' attorneys nor the inclusion of any nonchargeable hours in the number of hours requested. In adopting defendants' hours as a basis for calcualtion of a fee award, the Court considers plaintiff's vain efforts at prolonging this lawsuit. See copy of docket sheet attached hereto as Exhibit "A" showing the number of Pleadings and Orders spawned by plaintiff. The Court will allow counsel for HSF to be compensated for 156 55/60 hours of service in defense of his client. Similarly, counsel for GEH will be awarded 175.55 hours of compensated time, and counsel for GSC will be permitted 147.75 hours.

Defendants' counsel have requested varying

rates to be used in the calcualtion of the lodestar amount. HSF's counsel asks for $85/hr., while counsel for GEH and GSC pray for bifurcated hourly rates of $75/hr. and $100/hr. and $30/hr. and $40/hr., respectively. There can be little dispute that attorney's fees may range anywhere from $20 per hour to $300 per hour, depending on the location of the attorney's practice, the nature and complexity of the lawsuit and the experience of the attorney. The Court finds that the prevailing market price for legal services in civil rights actions in this community does not exceed $85/hr. The fees will be calculated, therefore, within that limit.

The presumptively reasonable rate-times-hours fee in this case equals $34,627.34. Defendant GEH has not, however, presented to this Court any specific evidence of a justification for a fee adjustment other than the fact GEH did not have a specific budget for dispensing compensation for legal services received. Pursuant to the dictates of the Supreme Court

in Blum v. Stenson, supra, and Hensley v. Eckerhart, supra, this Court shall not enhance GEH's fee award.

Review of the remaining Johnson factors leads this Court to a similar result. Although recognizing that many of the factors may be subsumed indirectly in the lodestar calculation,[5/] the Court nevertheless has reached the following findings of fact:

Amount Involved and Results Obtained

Plaintiff sought damages in excess of $1,000,000 from defendants. The action was disposed of on summary judgment and the suit was found to be frivolous and without foundation in the law. In prevailing, defense counsel were both diligent and expeditious in securing an early termination of plaintiff's claim.

Experience, Reputation and Ability of the Attorneys

All defendants' counsel proved themselves to be very competent attorneys who have a

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5/ See supra note 3.

substantial amount of expertise in this area of the law.

Novelty and Difficulty of the Questions

The issues presented involved neither complex factual findings of fact nor difficult or novel conclusions of law. The instant case developed no new legal theories or holdings.

Skill Required to Perform the Legal Service Properly

Defendants' counsel have performed skillfully in preparing the necessary legal services for their clients. No unusual skill was required here.

Preclusion of Other Employment

Defendants, in their motions for attorney's fees, presented no special circumstances with regard to this issue which requires an increase in the base amount already calculated.

Whether the Fee is Fixed or Contingent

Defendants' counsel are compensated on an hourly rate. There was no contingency.

Time Limitations

The case presented no special time limi-

tations or pressures outside of the normal deadlines imposed by litigation.

"Undesirability" of the Case

Defendants have presented no evidence indicating that this factor is relevant in the calculation of attorney's fees or costs.

Nature and Length of the Professional Relationship with the Client

Again, defendants have put forth no evidence warranting an increase in the base calculation.

Awards in Similar Cases

The award here comports with awards in other such cases.

CONCLUSION

After considering the Johnson factors, the Court finds that there shall be no enhancement in the lodestar figure to defendant GEH. Costs included, this Court awards defendant HSF the sum of $14,136.05; defendant GEH the sum of $14,528.84; and, defendant GSC the sum of $5,962.45. The sum total of this award is $34,627.34.

Accordingly, defendants' motion for attorney's fees is GRANTED and the Clerk of Court is directed to enter an appropriate judgment.

SO ORDERED, this 17th day of January, 1985.

s/Anthony A. Alaimo
CHIEF JUDGE, UNITED
STATES DISTRICT COURT
SOUTHERN DISTRICT OF
GEORGIA

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

NO. 85-8062

Non-Argument Calendar

FRANK B. HUBBY, M.D.,

Plaintiff-Appellant,

versus

HISTORIC SAVANNAH FOUNDATION, INC.,
GEORGIA ENDOWMENT FOR HUMANITIES, INC.,
and GEORGIA SEMIQUINCENTENARY COMMISSION,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Georgia

(July 31, 1985)

Before TJOFLAT, HILL and ANDERSON, Circuit Judges.

PER CURIAM:

Frank B. Hubby ("Hubby") appeals from a decision of the district court awarding attorney's fees and costs to the defendants in this action under 42 U.S.C. §1988. We affirm.

Hubby does not contend, nor could he, that the district court employed an erroneous legal standard in awarding attorney's fees to the defendants. Instead, Hubby argues that the district court's application of the law to the facts of the instant case constituted an abuse of discretion. After having carefully reviewed the parties' briefs and the record in the instant case, we conclude that the district court acted well within its discretion in awarding the defendants attorney's fees and costs.

Accordingly, the decision of the district court is AFFIRMED.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

NO. 84146

FRANK B. HUBBY,

PETITIONER

V.

THE HISTORIC SAVANNAH FOUNDATION;
GEORGIA SEMIQUINCENTENARY COMMISSION,
MR. B. H. LEVY, CHAIRMAN;
GEORGIA ENDOWMENT FOR THE HUMANITIES,

RESPONDENTS

PROOF OF SERVICE

STATE OF GEORGIA

COUNTY OF CHATHAM

FRANK B. HUBBY, after being duly sworn, deposes and says that pursuant to Rule 28.4 (a) of this Court, he served the WITHIN PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE ELEVENTH CIRCUIT on counsel for the Respondents by enclosing copies thereof in an envelope, first class prepaid, addressed to:

Mr. John E. Simpson
P.O. Box 1567
Savannah, GA 31402

Ms. Patricia Barmeyer
132 State Judicial Bldg.
Atlanta, GA 30334

Mr. Joseph Jacobs
Mr. James Langford
1000 Rhodes Haverty Bldg.
134 Peachtree Street, NW
Atlanta, GA 30303

and depositing same in the United States mails at Savannah, Georgia, on November ,1985.

Frank B. Hubby, Affiant

Subscribed and Sworn Before Me

This 13th day of November, 1985.

Lorraine B Slater
Notary Public in and for
Chatham County, Georgia

Notary Public, Chatham County, Georgia
My Commission Expires 9-25-88